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**Connecticut Hospice, Inc. and Roseanne Corning, an Individual.** Case 34–CA–10314

June 17, 2004

**DECISION AND ORDER**

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On December 3, 2003, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by Supervisor Jones' remarks to employee Corning to "be careful" with her booklet concerning nurses' rights, we observe that Jones made the statement on two separate occasions. It is unnecessary for us to determine whether either statement, standing alone, would have violated the Act. Member Walsh finds that each of Supervisor Jones' warnings to Corning to be careful with the booklet, standing alone, independently violated Sec. 8(a)(1).

With respect to the judge's finding that the Respondent further violated Sec. 8(a)(1) by discharging Corning, Members Walsh and Meisburg reject as without factual foundation the Respondent's assertion that Corning assaulted Bishop, a volunteer at the hospice. Like the judge, they stress Nurse Dickinson's credited, eyewitness testimony that Corning turned Bishop's face towards her "in a gentle manner." In addition, as the judge stated: "Corning's repositioning of Bishop's head to enable Bishop to understand what she was saying was understandable under the circumstance. As Dickinson testified, repositioning the head of a person with a hearing disorder is a common technique to focus their attention on the speaker's lips. Bishop clearly had a hearing disorder . . ."

Member Schaumber concurs in his colleagues' determination that Respondent violated Sec. 8(a)(1) of the Act by discharging Corning. However, in finding the requisite animus he relies solely on Respondent's falsification of the Retention Committee election results to exclude Corning, and Respondent's human resources director's statement to Corning that her participation in concerted activities could have caused management to harass her. Member Schaumber finds it unnecessary to rely upon either the judge's conclusion that it was understandable for Corning to "reposition" Bishop's head or the judge's assessment as to what would constitute an appropriate level of discipline for an unwelcome touching. Similarly, Member Schaumber does not rely

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Connecticut Hospice, Inc., Branford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(b) and (e).

"(b) Make Roseanne Corning whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision."

"(e) Within 14 days after service by the Region, post at its facility in Branford, Connecticut, copies of the attached notice marked 'Appendix.' Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2002."

Dated, Washington, D.C. June 17, 2004

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Peter C. Schaumber, Member

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Dennis P. Walsh, Member

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Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Quesiyah S. Ali, Esq. and Darryl Hale, Esq., for the General Counsel.*

*Edward F. O'Donnell, Esq., and Nicholas J. Grello, Esq., for the Respondent.*

upon the judge's analysis of Respondent's purportedly inadequate investigation or allegedly shifting defenses in finding that Respondent failed to establish a rebuttal defense.

<sup>2</sup> We shall modify sections 2(b) and (e) of the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Excel Container*, 325 NLRB 17 (1997).

*Judith A. Ravel, Esq.*, of Guilford, Connecticut, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on June 25–27 and July 31, 2003. Roseanne Corning, an individual, filed an original charge in Case 34–CA–10314 on December 9, 2002,<sup>1</sup> and an amended charge was filed on January 31, 2003. Region 34 issued complaint and notice of hearing on February 25, 2003. The complaint alleges that Connecticut Hospice, Inc. (Hospice or Respondent), threatened and discharged Corning in violation of Section 8(a)(1) of the Act. Respondent filed a timely answer wherein it admits, inter alia, the jurisdictional allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent in October 2003, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Branford, Connecticut, has at all material times engaged in the operation of a hospice, providing inpatient medical and professional health care services. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

Connecticut Hospice, Inc. has two components. One is an inpatient hospice and the other consists of five home care offices in different geographic areas so that most of Connecticut can be served by the Hospice. The primary business involved in this case is Respondent's hospital facility. Hospice is a concept of care for a patient with a terminal illness and the whole focus of the Hospice is to maintain the dignity of the patient and concentrate on the strengths of the family. It utilizes a physician directed/nurse coordinated system to address symptoms and alleviate pain, which can be physical, psychological, and emotional. As pertinent the Hospice employs nurses and certified nursing assistants to attend to the needs of the patients and their families.

#### A. Complaint Allegations

The complaint alleges and Respondent admitted that the following persons hold the title across from their names and are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act:

Caroline Musmanno	Director of Human Resources
Ron Knight	Vice-President of Operations
David Goldfarb	Vice-President of Finance

<sup>1</sup> All dates are in 2002 unless otherwise noted.

Judith Conley  
Rosemary Franco  
Andrea Jones  
Linda Spinelli  
Patricia Corradino

Co-Director of Nursing Services<sup>2</sup>  
Co-Director of Nursing Services<sup>3</sup>  
Evening Nursing Supervisor  
Weekend Charge Nurse  
Volunteer Director<sup>4</sup>

The complaint alleges that Roseanne Corning engaged in concerted activities with other employees for the purposes of mutual aid and protection by:

1. in or about September 2001, drafting and soliciting signatures for a petition protesting Respondent's failure to make timely contributions to its pension fund;
2. in or about June 2002, distributing pamphlets to employees concerning wage and hour laws;
3. in or about July 2002, distributing pamphlets to employees concerning documenting and resolving workplace issues;
4. in or about July 2002, at a staff meeting, advocating improved working conditions, inpatient to nurse ratio, and staff retention;
5. in or about August 2002, soliciting staff suggestions and recommendations for improving working conditions, inpatient to nurse ratio, and adherence to wage and hours laws, and drafting a compilation of the staff recommendations to be submitted to management; and
6. on or about August 6, 2002, refused an assignment due to an unsafe inpatient to nurse ratio.

The complaint alleges that in or about July 2002, by Andrea Jones, threatened Corning with unspecified retaliation if she continued to engage in protected concerted activities.

The complaint alleges that on or about September 27, 2002, Respondent terminated its employee Roseanne Corning because Corning engaged in the conduct described in paragraphs 1–6 above, and to discourage employees from engaging in these or other concerted activities in violation of Section 8(a)(1) of the Act.

#### B. Facts and Findings Related to Corning's Alleged Protected Concerted Activities

Roseanne Corning is a registered nurse who was employed as a staff nurse by the Hospice from April 1996, until her discharge in September 2002. For the 6-years prior to her employment with Respondent, Corning was part of a group that imported and exported seafood and part of a group that tried to sell biotechnology and pharmaceuticals from Israeli companies to China, India, and Pakistan.

For the last 2 years with Respondent, Corning worked evenings. The Hospice is a three-story facility, with the first floor used as a reception area, nursing offices, and a cafeteria. The second floor houses patients and has areas for their visitors. The third floor is primarily used for administrative offices and some rooms where families can stay overnight. The second floor has

<sup>2</sup> Conley held this position at all times material to this case. She is currently vice president of clinical services for Respondent.

<sup>3</sup> Franco held this position at all times material to this case. She is currently assistant vice president of nursing.

<sup>4</sup> Mrs. Corradino married subsequent to the events in question and was previously known as Patricia Nowak. She will be referred to herein by her married name.

a center area called the “commons” and two wings off the commons. The wings are also divided into two areas of responsibility. The four patient areas are called Star I and II and Sun I and II. The patient capacity of the various areas is about 50 beds.

### 1. The pension plan letter

In August 2001, Mary Gerlach, a registered nurse employed by Respondent, found that Respondent was not making contributions to her pension fund in a timely manner. She contacted Hospice’s pension plan administrator, who advised her to contact Allyson Fox with the federal agency known as the Pension Welfare Administration. She informed Respondent’s vice-president of finance, David Goldfarb, and told him she was calling Fox and then she called Fox. Fox asked if other employees were experiencing the same problem and she said she did not know but would talk with the other nurses. She began asking around and Corning heard from some nurses that Respondent was making untimely or incorrect contributions to the employees’ pension plan. Gerlach then approached Corning and asked Corning to follow up on the contact she had made with Fox at the Pension Welfare Administration by writing to the agency a letter in the form of a petition by employees. This was a necessary step to have the agency investigate Respondent’s pension plan. Corning and Gerlach composed this letter in which it alleged that Respondent was making delinquent and possibly incorrect contributions to its pension plan. The letter also quotes Goldfarb in a meeting with employees as making the “promise that they will try to be caught up by 9/30/01.” The letter/petition is signed by Corning and about 20 to 30 other employees of Respondent.<sup>5</sup> Corning and Gerlach solicited these signatures from fellow employees. Corning may have gotten help in securing employee signatures from a Debbie Barnum. She also showed the letter to Doreen Gallagher, who she believed to be in Hospice’s management in Respondent’s home care patient division. Gallagher told her she could not sign it because of her position, but did not discourage her efforts. Corning also spoke about the letter with her supervisor at the time, Debbie St. John, whose reaction was the same as Gallagher.

After getting other signatures, Corning mailed the letter to Allyson Fox on September 14, 2001. Thereafter, in early January 2002, Corning was in a meeting with one of Respondent’s vice presidents, Claire Pace, and its director of human resources, Caroline Musmanno. Corning asked for the meeting, as she felt harassed by a member of nursing management. Corning was asked if she knew of a reason why she might be the target of harassment. Corning answered it might be because she wrote the pension plan letter. Musmanno said she had not known that Corning wrote the letter, but said, “But that could do it.”

### 2. The “Quick Reference” booklet

In or about July 2002, Corning obtained what is called “Nurses Quick Reference to Workplace Issues,” a 66-page booklet published by the Connecticut Nurses’ Association. Inter alia, the booklet deals with such issues as mandatory over-

time, unsafe/inadequate staffing, patient assignment issues, and re-assignment, and states guidelines for reporting and resolving such issues. Corning took the booklet to work and showed it to some other employees, including her supervisor Andrea Jones. One of her co-workers she showed the booklet was Elvira Manas. They discussed the booklet and specifically how it dealt with the differences between refusing an assignment in a professional manner and what is considered nurse abandonment, and how to document in a professional manner incidents that happen. In her first conversation with Jones about the book, Corning pointed out that it contained the same information that had appeared in an article she had read about accepting of assignments and patient abandonment. According to Corning, Jones read through those sections in the booklet. Jones commented that it was good and to hold on to it. In a later conversation, Corning testified that Jones told her, “Rosie, be careful with that (the booklet).” Jones testified and denied having ever seen the booklet, having any conversation with Corning about the booklet or telling Corning to be careful with the booklet. I credit Corning’s testimony and reject Jones’ denials. Supervisor Andrea Jones testified and confirmed some conversations other witnesses said occurred, but denied any part of those conversations which could be adverse to Respondent’s position. Her testimony and that of other of Respondent’s witnesses seemed totally contrived to me and I do not credit any of it. Corning testified that in July, in a staff meeting with Respondent’s co-director of nursing, Judith Conley present, she mentioned the booklet. Conley had no memory of ever seeing the booklet.

### 3. The staff retention actions

Staff meetings were routinely held at the Hospice and Corning attended two such meetings in July. The first of these meetings was conducted by Conley and was attended by about 20 employees. The nurses expressed their dissatisfaction with staffing levels that were considered too low and caused the staff to be overworked and stressed. Nearly everyone asked about the matter in this hearing conceded that there is a shortage of nurses. Corning named several employees who spoke out with variations on this problem. One of the suggestions was to close a wing and take in less admissions. Conley responded by talking about the initiatives that management was taking to get new nurses. Corning replied that rather than worry about recruitment, Respondent should concentrate on retaining the existing nurse employees and improving the workplace environment. She argued that taking those steps would not only help retain existing employees, but help in recruiting and keeping new nurses. She talked about some of the other shared governance paradigms that she had found researching in the Connecticut Nurses Association library and in an article she had read. Corning suggested establishing a nurses retention committee to come up with suggestions about improving morale and the workplace. Conley said she would take up the matter with higher management.

At about this time Nurse Elvira Manas came into the meeting distraught about the amount of work on the floor that evening. When Manas’ outburst was over, Corning quietly announced to Conley that she was not going to take any more than

<sup>5</sup> The signatures are in some cases difficult to read.

six patients at a time.<sup>6</sup> That had been the standard and ratio used by the Hospice at some prior point. She urged the other nurses to go back to that standard and some agreed with her. Conley admonished her saying, "Well, that isn't fair to your co-workers because that means they have to take up the overload." Corning replied, "No, that in fact, that (the one nurse to six patient ratio) was what our standard was supposed to be by regulation and therefore it was not my responsibility, it was management's responsibility to provide enough nurses so that we could maintain that ratio." On that note, the meeting ended.<sup>7</sup> The regulations which Corning referenced in this meeting are contained in General Counsel's Exhibit. 5.

Clinical Supervisor Bernice Batson takes notes at staff meetings and introduced notes of this meeting. She had notes for such a meeting on July 11. Inter alia, it indicates a great deal of the meeting involved discussion of recruitment and staffing related to nurses and CNAs. It lists a number of suggestion made, but does not relate from whom these suggestions were made. It does not mention anything about staff retention. I again credit Corning's testimony and credit her assertion that she told Conley that she would refuse assignments that exceeded what she considered a safe patient to nurse ratio. Corning a few weeks later did refuse an assignment.

The second staff meeting Corning attended in July was led by Ron Knight, vice-president of operations for the Hospice and by Conley. It was attended by a number of employees. Knight began by stating that management had not realized that the nurses were so overburdened and apologized. He then authorized establishing a nurse retention committee which would have as its purpose the retention of employees at the Hospice. Nurses were then allowed to state what they felt was needed. Various nurses spoke and offered a number of suggestions and complaints. One wanted paid receptionist on each wing so nurses would not have to answer the phones. Another complained that she had worked alone with 12 patients and that was an unsafe situation. Another complained that when she was hired she was told that she would have only four patients and after orientation was immediately given eight patients.

Batson's notes do not mention this meeting, and she testified that the next staff meeting took place on August 8. However, I am certain the second July meeting testified about by Corning took place, notes or no notes. On July 19, Respondent put out a newsletter to staff, that, inter alia, states that management is going to establish a task force for nurse retention at the Hospice and it asks for employees to suggest names for members or to volunteer to serve on the committee. The idea for staff retention came from the staff according to Batson. By the time of the August 8 meeting, the staff retention committee had already been selected. I credit Corning's testimony about this meeting.

Corning next sent a fax to the employees of Respondents satellite offices notifying them of the retention task forces and

encouraging them to participate in it. In the fax, she suggests they contact Conley noting their interest in participating.

Employees began giving Corning their ideas or suggestions for the retention task force and she noted them on a sheet of paper where she put her suggestions and added suggestions from several other employees. She got another list of suggestions written and given to her by CNA Robin DiMenna. Yet another such list was compiled by employee Kathy Tomblin and was given to Corning. She received an e-mail compilation of suggestions from employee Joan Woodman. Corning then sorted out the suggestions and typed them by category in a 2 page, single space document headed "What needs to be done to make a better workplace environment for you or that you think would better retain you or other staff members." After the retention committee was in place, Corning gave this document to Mary Gerlach and another employee selected to sit on the committee to use when they met. Though not discussed at this point in the record, Corning slipped this document under Caroline Musmanno's office door and Musmanno confirmed she had seen it.

Bernice Batson testified that staff were asked to submit the names of those who were interested in being on the retention committee and those names were sent out in a newsletter by Respondent for staff to elect who they wanted.<sup>8</sup> She added that over a period of a week or more, little pieces of paper would show up under Batson's door or on the Hospice's co-director of nursing, Rosemary Franco's desk and were placed in a folder. Batson testified that Corning did not win a spot on the committee. She, Franco, and Conley counted the ballots. After the votes were counted, the ballots were thrown in the trash. From Corning's shift, nurses Nancy Harkey and Kathy Tomblin were elected according to Batson.

Corning volunteered to be on the committee herself by telling Conley of her interest.<sup>9</sup> On an evening thereafter, when she came to work she was told an election was being held to select members for the committee. She was told to write two names of persons she wanted to be on the retention committee on a slip of paper. Corning testified that after the votes were tallied, and she did not get on the committee, she was told by the other nurses on the evening shift that they had compared their votes and Corning got more votes than any other employee. One of these nurses suggested she speak to Supervisor Jones. She spoke by phone with Jones the next day. She reiterated what she had been told by the nurses the day before, and Jones agreed that they were correct because she had seen some of ballots in a desk drawer. Jones and another nurse, Kathy Tomblin spoke about this issue. Tomblin had been placed in the committee. Jones told Tomblin that Corning had received most of the votes, Tomblin had received a few and another employee put on the committee, Nancy Harkey, had received just one vote. Tomblin called Conley and told her she had learned that the election results had been falsified and that she felt uncomfortable being on the committee. She felt the election was a fraud and she could not be part of it. She mentioned that the

<sup>6</sup> Conley remembers nurse retention being discussed but could not remember Corning "refusing patient assignments" at a staff meeting.

<sup>7</sup> The tr. does not reference that these regulations were admitted into evidence because the General Counsel did not reference them by number when offering them into evidence. They are part of this record.

<sup>8</sup> No one put such a newsletter in the record, assuming one existed.

<sup>9</sup> Batson confirmed that she was aware that Corning had indicated interest in being on the committee.

entire retention project was Corning's "baby" and that Corning would be a premier person on the committee. Tomblin did not attend any of the meetings of the Committee. Jones admitted having conversations on this issue with both Corning and Tomblin. She denied telling them about the vote count or that Corning got the most votes. I credit the testimony of Tomblin and Corning over that of Jones. Even though I found the testimony of Corning more credible than that of Jones as a general proposition, here a totally uninvolved witness corroborates Corning's version. I find that the election was in fact a fraud and that Respondent kept Corning off the retention committee. It obviously did not want an intelligent activist armed with knowledge of her rights as a nurse in a position to influence other nurses.

On August 8, Respondent issued a newsletter to employees wherein it names the persons the Hospice stated were chosen by the election to be on the committee. Mary Gerlach was one committee person selected even though she did not submit her name for consideration. Gerlach attended meetings of the retention committee. For management, Franco, Bernice Batson, and Judith Conley attended some or all of the meetings. At one of the meetings, management was asked why Corning was not on the committee because she compiled most of the information the committee was addressing. Conley responding by explaining the election process and stated that Corning's name had not been submitted. Committee member, Nancy Harkey, noted that Tomblin had declined to take her position on the committee and offered that Corning should take her place. Conley said the committee would stay as it was. Conley was given a copy of the document prepared by Corning containing all the suggestions that employees had given Corning. Notes of the meeting reflect that Corning was given credit at the meeting for the document. According to committee member Bernice Brotz, none of the suggestions discussed at this and subsequent meetings were ever implemented.

On August 4, Corning wrote Respondent's CEO Rosemary Hurtzler, thanking her for the bonus Corning received in her paycheck that week. It states, *inter alia*, "I truly appreciate the acknowledgment and this gesture indicating that our voices of concern are being heard and that you are listening and understanding the dilemmas to be addressed." Corning sent a similar letter to Co-Director of Nursing Rosemary Franco.

#### 4. The issue of refusing assignments

In July, Corning also read and cut out an article by the Connecticut Board of Examiners for nursing setting guidelines for patient abandonment for nurses. She showed it to Supervisor Jones who had read it, and then gave a copy of the article to Judith Conley. She wanted Conley to have it because it delineated nurses' rights and responsibilities on the subject of nurses declining assignments. Conley admitted reading the article.

On August 6, Corning spoke by phone with Clinical Supervisor Bernice Batson about Corning's assignment. She called the Hospice and had Batson paged. She told Batson that she was concerned about the staffing mix for that evening in that she was assigned to 12 patients and was to be assisted by two CNAs, one of whom had severe personal problems that made it impossible to delegate tasks to her and leave her alone. Accord-

ing to Corning, Batson said, "You beeped me out of lunch for that?" Corning said she had because she had been trying to reach Batson since the night before, but Batson was not responding to her messages. Batson indicated there was nothing she could do about the situation. Corning then said she was prepared to work, but could not work with the present staffing mix and asked that it be changed. Batson instructed her to stay home.<sup>10</sup> Corning pleaded with Batson to no avail. Batson testified that she had gotten notes from Corning about this problem prior to this phone call. In response she had tried to get a per diem nurse to come in and tried to get someone on the shift to stay for the next shift with no success. She told Corning to stay home. She did not remember the problem with the staffing mix or any particular CNA.

Corning then called Supervisor Jones. She explained to Jones what had happened with Batson and Jones asked if she were willing to come in and Corning said she was, but had been instructed by Batson to stay home. Jones said she would check into the matter. Jones reached Franco at the Hospice and she confirmed that Corning had been told to stay home. Franco also indicated that she was in a meeting and could not talk at that time. Jones told Corning that when she got to work, she would see if Corning could come in. She also said that if she did not call back, to come in on the next day, August 7.

She came to work on the 7th and was asked to talk with Franco. She went to her office and found Franco, Batson, and Jones there. Franco asked what happened the day before. She told Franco what she related above, mentioning the problem with the mix. Franco indicated that the problem-nursing assistant had been fired that morning. Corning noted that it was still a problem on the 6th when she would have had to work with the employee. Franco then talked with her about refusing assignments when there were more than six patients or she would be working alone. Corning said that it was her right as a registered nurse to assess an assignment and that she could refuse it or ask for an alteration before accepted an assignment. According to Corning, Franco said, "this cannot go on because it is going to escalate and other people are going to be doing this. I am going to have to take this further." Corning then told Franco that she was not her adversary and supported the Hospice and its original mission and philosophy. Batson, Jones, and Franco deny this meeting ever occurred. I credit Corning's detailed testimony about this meeting over the flat denials by the three managers. I find it incredible that no one in management would allow Corning to refuse an assignment for the reasons she gave and not inquire about it. It was clearly an unusual situation. Because of the barely veiled threat by Franco in the meeting, it is no wonder that Respondent does not want to admit it took place.

Corning's refusal of the assignment certainly got the attention of Respondent's Co-Director of Nursing, Judith Conley. She testified that following this action by Corning, she spoke at a staff meeting held August 8, where she told staff she did not support refusing assignments because the staff had a responsi-

<sup>10</sup> Corning was suggesting that they pull another two person certified nursing assistant team from another wing and substitute for the team assigned.

bility to the patients and their families and it added a burden on co-workers. According to Conley, no one has refused an assignment since Corning did on August 6.

After the meeting of August 7, Corning spoke with Andrea Jones. According to Corning, Jones told her that she told Franco after Corning left that she should not challenge Corning on this issue, that Corning knew what her rights were and mentioned Corning's book of nurse's guidelines. Corning then said she had the book with her. According to Corning, Jones told her, "Rosie, be careful, be very careful."<sup>11</sup> Jones denies this conversation took place. I credit Corning's testimony in this regard.

Corning made a contemporaneous memo of the events of August 6, and mailed the memo to Conley and Franco. The memo mirrors her testimony of these events. She also sent these women a memo detailing her view of the unsafe and inadequate staffing of the Hospice on August 2. She noted another nurse had looked at her assignment (one nurse and two cnas for 21 or 22 patients) and refused the assignment. The situation was reported to Batson who said she could do nothing about it. So Corning volunteered to work a second shift assisting the nurse. Before she left that night, another nurse working asked her to document what had happened because she was upset with the staffing.

On August 9, Corning sent a memo to Judith Conley, Rosemary Franco, and Andrea Jones about what she considered inadequate and unsafe staffing on July 27 and 28.

#### 5. Issues related to Corning's paycheck

In June, Corning read an article published by the American Nurses Association entitled "Should You Be Getting Overtime?" It sets out the rules governing the payment of overtime and suggests certain aspects of work for which employees are eligible for overtime. She brought the article to work and discussed it with fellow employees. She particularly noted that it did not require a supervisor's signature on timesheets showing overtime worked and that it was illegal to change a timesheet without the nurse's knowledge. She also noted that it was against regulations to give nurses personal time off in lieu of overtime pay without the employee's permission. She named several employees to whom she showed the article and discussed it. She also showed it to Supervisor Jones. Her affidavit to the Board was read into the record in part. Therein Corning stated: "The employer did not always compensate the employee for overtime work if the time sheet was not signed by a supervisor. The employer would also, at times change the time sheet of staff and give personal time off, PTO, instead of money for the overtime work, without speaking to the affected staff member. As of result of my efforts, staff began to insist upon being paid for hours worked instead of just accepting the PTO and not noticing it in their paycheck." She identified CNA Robin DiMenna as one of several other CNAs as being in this group who responded to what she showed them.

<sup>11</sup> There is no mention of this warning to be careful in Corning's affidavit to the Board. However, the affidavit does mention a similar comment by Jones made in July in connection with the Nurses Quick Reference booklet.

Corning produced her timesheet for the period July 28 through August 10. She testified that she filled it out and turned it in. When she got her paycheck for this pay period, she discovered that she had not been paid for the hours she had claimed. She inquired about the matter with Respondent's payroll clerk and learned that the timesheet had apparently been changed without Corning's knowledge. The payroll clerk agreed that it should not have been changed without her knowledge and suggested she speak with Caroline Musmanno. Musmanno was shown the timesheet and the Respondent's rules about pay and agreed that that it was inappropriate to change the sheet without Corning's knowledge and perhaps the changes themselves were inappropriate. She referred Corning to David Goldfarb. Goldfarb told Corning that it was his understanding that Corning had been informed of the changes by her supervisors before they were made. Corning denied this. Goldfarb said he would look into the matter. She saw him again and he told her that her supervisors had been in touch with her about the matter and she responded that they had not been in touch with her. The matter was left unresolved.

#### C. Corning's Job Performance

Corning's employee evaluation forms for the period 1997 to 2002 were introduced. The forms rate employees in a number of ways and then places them in a grading category. For the last 3 years, Corning was placed in category IV in 2000 and 2002 and in category III in 2001. There are five grading categories, I to V, with V being the best. The description of category IV reads: "During the past year, the employee has exceeded the standards expected of Hospice employees in that position. The performance shows a clear progression from the level previously achieved or has continued with sustained excellence. The attitude is one which continually fosters a harmonious workplace." The last three evaluations were performed by Rosemary Franco in 2000, Debbie St. John in 2001, and Andrea Jones in 2002. All the evaluations were made in the month of April. Notably, practically all of the activity Corning engaged in as described above took place after April.

Corning was made aware of a patient complaint concerning her in May 2001. Her supervisor at the time, Debbie St. John, informed her that the family of a patient felt that Corning has spoken in a rude manner and requested that she not attend to their family member. St John asked her to document what she knew of the situation. She prepared the documentation, gave it to Respondent's then director of nurses, Tara Green, and heard nothing more about the matter.

In August 2002, Corning became aware of a critical letter sent to the Hospice by the family of one of Corning's patients. She was called to Franco's office. Inter alia, Franco and Corning agreed that she had attended a specific patient,<sup>12</sup> and Franco asked Corning if she had asked the patient if she had had a drink (alcoholic). Corning replied that she had asked that question of the patient. She explained the patient had mentioned liking white wine and Corning told her she would try to get an

<sup>12</sup> Though the record contains the patient's name, I decline to use it in this public document.

alcoholic beverage order from her physician. Corning asked the question to see if her request had been granted.

Franco asked her whether on her last visit with the patient she believed that the patient would die soon. Corning stated that the patient did not appear to be in the last stages of dying when she last saw the patient. She added that if she had made this assessment, she would have contacted the family.

Franco then asked about the amount of morphine that was given to the patient the last time Corning attended to the patient. The family had complained that she was given a very large dose of morphine on that occasion. Corning remembered the dosage and stated that it was the dosage ordered (by the doctor). Franco then asked that upon admission of this patient, had she been given an injection of morphine and if so, why. Franco also inquired about the length of time the admission had taken as a family member had alleged it took 4 1/2 hours because of Corning's absence from the room. Corning replied that when she approached the patient to welcome her, she was in pain and the doctor attending ordered Corning to give her the morphine injection. She stated that she was then called away to attend to a patient in respiratory distress and was away for a while. She denied that she was away 4 hours as claimed by the family of the patient being admitted. She testified that she completed the admission process in the family room with the sister of the person writing the letter, who may not have been aware that the admission process was being completed out of the patient's presence. She also told Franco that the sister who had helped her at admission had said that the letter-writing sister did not want the patient in the Hospice. Corning knows of no discipline that resulted from this incident.

Batson testified that had been at this meeting, took notes and put them in Corning's personnel file. Her notes state generally what Corning stated in her testimony. Batson testified that the notes were not a warning, but simply a note to herself about events that happened.

Corning testified that prior to September 21, she had received no complaints other than the two noted above.<sup>13</sup> At the beginning of September, Corning asked that her hours be reduced as she was becoming weary. She said she needed more time to rest and revitalize. She had a schedule that did not allow two consecutive days off. She asked to work 5 days one week and 4 the next, a common staffing practice called a "Point Nine." She made this request of Franco, who granted it.

#### *D. Facts Related to Corning's termination*

On the evening shift of Saturday, September 21, Corning was working with LPN Laura Wrezyenski and CNA Linda Dickinson.<sup>14</sup> Linda Spinelli was the weekend supervisor. At report at the beginning of the shift, Corning learned that there was a newly admitted patient and she and Dickinson went to check his condition. He was in room 227. There were four beds in the room, all occupied. The beds are identified as 227A

through D. The patient they were to attend was in bed 227A. They found the male patient thrashing back and forth in pain. He was having respiratory problems, was agitated, and had undressed bloody skin tears on him. A doctor was also in attendance at the outset of treatment and gave Corning some instructions concerning the patient. The doctor then evidently left.

Corning could not leave the patient as he was, so she and Dickinson got supplies and began cleaning him and dressing the skin tears. She tried to put a catheter in him because of bladder spasms. While they were doing this, the wife of another patient in the room in bed 227D called to Corning by name and asked if she could help. Corning replied she was tied up at the moment, but would get help. She took off her gloves and put on the call bell. This caused a light to flash outside the room in the hallway and a bell to ring at the nurses' station. There was another button she could have pushed that causes a red light outside the room to flash and a bell to ring. It is apparently more of an emergency signal for a nurse to come immediately. She did not push this one. Corning and Dickinson went back to work on the patient. Shortly, Anne Bishop appeared outside the privacy curtain surrounding the patient's bed. Bishop was at the time an elderly volunteer at the Hospice who manned the wing's desk and answered the telephone. Evidence adduced throughout this case establishes that Bishop had a hearing loss. Corning told Bishop that help was needed with the patient in 227D and would she please get a nurse. Bishop said, "What?" Corning repeated her request. Bishop said she could not hear what Corning was saying and asked to come inside the curtain. Corning answered affirmatively and Bishop came inside. Corning again repeated her request for a nurse. Bishop went out into the room and went to each of the other beds and inquired whether help was needed. All of the patients in the room were nonverbal and one was nonresponsive. Bishop came back inside the curtain and told Corning that none of the patients needed help.

Corning testified that she had finished a procedure with the patient, and had put on clean gloves. She turned around and gently took Bishop's face in her hands and said, "Annie, I need a nurse in 227D, please get a nurse." Corning testified that she did not shake Bishop and that she did not touch her with dirty gloves.<sup>15</sup> Corning then opened the curtain and pointed out with her finger and told Bishop to get "Laura (Wrezyenski), we need help in 227D." Bishop then went outside the curtain and repeated that no one wants anything.<sup>16</sup> Corning testified that she and Dickinson continued working on the newly admitted patient when she heard the patient in 227D begin coughing. Corning started taking her gloves off to attend to his cough, when another nurse Doris Uzanus came in and inquired if Corning needed help. At about the same time, Laura Wrezyenski opened the curtain and Corning asked her to check on the patient in 227D. About a minute to a minute and a half passed between Bishop's leaving the room and the arrival of the other two

<sup>13</sup> On cross examination, she remembered a meeting with the then director of nurses about a complaint of Corning being too intense at bedside.

<sup>14</sup> This witness's name is spelled Dickenson in the transcript, but spelled Dickinson on R. Exh. 9, a personnel form. I believe the latter spelling to be correct.

<sup>15</sup> Corning estimated she changed gloves three to five times while attending this patient.

<sup>16</sup> Corning later spoke with the wife of the patient in 227D. She told Corning that she had told Bishop when she asked if they needed anything that she thought she should wait for Corning.

nurses. Corning and Dickinson continued treating their patient until they finished.

Dickinson stayed with the patient and Corning left to get medications for him. She passed the nurses station and Bishop was there and called out to Corning. Corning turned and walked toward Bishop, who said she was leaving. Bishop was very angry and said to Corning, "If you ever point a finger at me out of a curtain again, or touch me ever again, I'll break your neck. I will break your neck." Corning's documentation of the event states that at this point in the exchange, Corning stepped aside and Bishop said, "Don't you touch me." Corning replied, "I am not touching you, Annie." Bishop left and Corning medicated her patient. Corning then went to see Supervisor Spinelli. She told Spinelli that she had just had a terrible interaction with Bishop and was upset. She told Spinelli that Bishop was not competent to be answering the telephone or responding to call bells.<sup>17</sup> Corning asked that Bishop be assigned to another volunteer function, as she constituted a safety issue. Corning then explained what had happened at the patient's bedside and asked Spinelli to pass on this information to the two nursing directors and the day-time supervisors. She believed Bishop to be a big problem. Spinelli said she would pass along the information and told Corning to inform the director of volunteers, Pat Corradino. Spinelli also told her that Bishop was hard of hearing and that Corradino might not be aware of the problem because she had little interaction with Bishop.<sup>18</sup> According to Corning, Spinelli did not criticize Corning for touching Bishop. Spinelli gave very vague testimony on this conversation, though confirming most of what Corning said. She also testified that she

<sup>17</sup> Staff nurse Kathy Tomblin testified that she had observed Bishop on the telephone and testified that Bishop had a hearing problem, often asking callers to repeat themselves several times. Tomblin considered Bishop a safety concern because of her hearing problem and used her as little as possible because of this concern. Staff nurse Nancy Harkey testified that Bishop's hearing was deteriorating and that she would have to shout to get Bishop to understand what she was saying. She said that about the time of the incident with Corning, Bishop was stressed and became easily upset. Staff nurse Elvira Manas testified that unless one had Bishop's attention and she was looking at the person talking to her, she would not hear what was said. General Counsel called a witness on rebuttal who testified that Bishop had a faulty memory. I consider this testimony to be irrelevant to the issues in this case.

<sup>18</sup> Respondent's staff nurse Bernice Brotz testified that in August, she observed Bishop loudly chastising a woman standing in front of the elevators near the commons. When the elevator arrived the woman got on. In response to Brotz's inquiry as to what was happening, Bishop replied that the woman had frightened her while she was walking her dog, threatening to report Bishop for animal abuse. "I scared her the way she scared me," said Bishop. The matter came to the attention of Musmanno and Corradino, who both asked Brotz about it. In September, Brotz instructed Bishop to call a doctor because she needed to speak about the patient's medication order. Bishop went to make the call then returned and snatched the patient's report from Brotz's hand. Brotz then approached Bishop and asked what she was doing. She said she was reading the report to the doctor. Brotz told her that Brotz needed to read the report to the doctor and took back the patient's report. When the incident with Bishop and Corning took place, Brotz attempted to tell Franco about this incident and Franco told her, "We're not discussing anything about Annie from this day forward."

told Corning, "You should not have touched her." I believe that Spinelli may well have expressed this concern, but her actions thereafter indicate that it was not a matter of great concern to her. She did not immediately report the incident to higher management. Instead she waited until the next day. Spinelli had hard feelings about Corning because of an incident in the summer of 2002. An aide had offered to work a double shift and it had been noted on the schedule. However, just before the second shift, Corning's shift, the aide asked to rescind the decision to work because she felt ill. According to Spinelli, when Corning learned the aide was not going to work the second shift, she became angry and "read me the riot act," in front of other staff. Again, according to Spinelli, Corning said, "[I] don't care whether she felt well or she was sick. She signed up to work a double shift, she should work a double shift." The aide changed her mind and worked. Spinelli testified that she felt attacked and left feeling the most upset she had ever been leaving work.<sup>19</sup>

On the matter of Bishop's hearing, director of volunteers, Patricia Corradino testified that in the year or so before the September incident, she had reports from nurses that Bishop had a hearing problem. Corradino told Bishop that it was time to get a hearing aid, but Bishop declined to do so. Claire Pace worked for Respondent from 1990 until April 2002, when she resigned. Her last position with the Hospice was that of vice president of clinical services and clinic Advancement. At a staff meeting of nurses some where in the period of November 2001 to April 2002, complaints were voiced by staff over Bishop's performance, particularly relating to her memory, hearing, and health. This meeting was attended by the nursing management. After the meeting, she spoke with Corradino about the complaints. Corradino indicated she would follow up on these concerns.

There was one uninvolved eyewitness to the bedside incident between Corning and Bishop, Linda Dickinson. She was employed by Respondent on September 5, as a per diem CNA and her supervisor was all material times Andrea Jones. Dickinson has been a certified nursing assistant for about 12 years. She testified that she worked with Corning prior to September 21. She is familiar with infection control techniques which require the use of a gown, gloves, and mask, that hands are frequently washed and that gloves are worn at all times. Dickinson testified that Corning adhered to the infection control techniques.<sup>20</sup> Dickinson described Corning as soft spoken, caring, loving, and comforting to patients.

Dickinson testified that Bishop entered the room in response to a call light indicating a patient in the room needed help. Corning asked Bishop to go get LPN Wrezyenski because they could not leave the patient they were working on. Bishop said, "no, they don't need help." Corning repeated her request to Bishop four or five times and each time, Bishop refused stating that help was not needed. According to Dickinson, Bishop ei-

<sup>19</sup> Respondent's director of volunteers, Patricia Corradino related that she was told by a volunteer about 2½ years before that Corning was rude to her and the volunteer quit.

<sup>20</sup> According to staffing schedules introduced by Respondent, Corning and Dickinson had work together twice before.



ther was just refusing to obey this command or did not hear and understand the command. Under Hospice protocol, Bishop was bound to follow the direction of a registered nurse. At this point, a frustrated Corning put her hands to Bishop's cheeks in a gentle manner and said to Bishop, "Please look at me. Just go and get Laura, we need help." Dickinson testified that the way Corning touched Bishop was a way used by Dickinson to get the attention of someone with a hearing disorder. Bishop then left and according to Dickinson, everyone was upset. Dickinson could not recall whether Corning was wearing gloves or not. She testified that Corning would not touch anyone with dirty gloves and believed she was either not wearing gloves or had just put on new gloves when she touched Bishop. Dickinson testified that there was nothing violent or malicious about the touching. Later that evening Dickinson overheard Bishop telling someone that she was upset and would not accept being treated like that.

Dickinson's affidavit given to the Board states: "At some point during the crisis someone in the room asked for help, someone put the call light on and Anne Bishop a volunteer receptionist came behind the curtain. Corning told her that they needed help and would she please go and get Laura. Bishop left the curtain. I heard her talking to someone in the room, she came back behind the curtain and said nobody needed help. Corning again told her to get Laura. Bishop never went out to get Laura. Bishop again came back behind the curtain. Corning then cupped her hands to both sides of Bishop's face and said, 'Anne, please listen to me. I don't think you are hearing me. Please listen, go and get Laura.' Bishop then left the room. I don't know if at that point she went to go and get Laura or if Laura ever entered the room. If Corning had gloves on when she touched Bishop they had to be clean; however, I was not focused on the gloves. Corning definitely did not squeeze Bishop's head or shake her head. Corning also did not raise her voice or act in any malicious way. If Corning had acted violently or maliciously, I would not have stood there. I would have reported the act. Corning may have pointed towards the direction of the patient that needed help, but I don't recall that at this time."

Dickinson finished the rest of the evening shift and was not spoken to by anyone with management about the touching incident. She worked the evening shift the next night, the 22nd, and again no one with management spoke with her about the incident. On Monday, the 23rd Dickinson spoke by telephone with Respondent's co-director of nursing, Judith Conley. Dickinson was not aware of Conley's position when they spoke. Conley asked her about what happened between Bishop and Corning. Dickinson testified that she told Conley that she and Corning had been in the room with a patient for about an hour and a half, and then Bishop came in the room and stood outside the curtains. She said that Corning repeatedly asked Bishop to get Wrezyński, and Bishop continually replied that no help was needed. She told Conley that Bishop then came inside the curtained area and Corning touched her face gently and said, "Please look at me, please hear what I am saying, please go and get Laura." She then told Conley that Bishop left. Conley asked if she heard anything further and Dickinson replied she had not as she stayed with the patient. Dickinson told Conley there had been no raised voices and no malicious intent.

been no raised voices and no malicious intent. In response to Conley's question about whether Corning was wearing gloves, Dickinson answered that she did not recall, but based on her knowledge of Corning's infection control orientation, she believed that Corning would not touch anyone with dirty gloves. Dickinson was a new employee at the time and felt uncomfortable with the questions and asked Conley were it was leading. Conley assured her that she was just investigating and would speak to others about the incident. Conley did not tell her that she was taking notes of this conversation and she did not ask Dickinson for a written statement. Conley did not thereafter show Dickinson her notes of the conversation to ensure their accuracy.

Dickinson worked the evening of September 24, and noticed Corning's name had been scratched from the staffing schedule for that evening. Dickinson was upset and spoke with her supervisor, Andrea Jones, and told her that she was upset and not sure she should have talked with Conley about the incident. She told Jones that she did not understand why Corning was not at work as there was no malice in what happened. After Dickinson related her feelings to Jones, Conley approached and asked her to come into the charting room. When there, Dickinson again related to Conley what happened and again asserted that nothing malicious had taken place. With Conley's permission, Dickinson touched Conley's face as Corning had touched Bishop's face. Dickinson testified that she had a bad feeling about what was happening and noted this to Conley, who assured her that the Hospice was just investigating. She added, "Everything will be all right." Dickinson spoke only with Jones and Conley about the incident, as no other member of management asked her about it.

Bishop died in December and no deposition or affidavit was taken of her version of the events of September 21. She did, however, make a handwritten memo of these events from her perspective. The memo reads: "92 year old patient was admitted approximately 3p 9-21-02. Ms Corning was admitting nurse. Dr Long gave her instructions as to how the patient should receive treatment—they discussed this at my desk. ½ hour later, the call button lit up for 227A (patient's room). I went to the closed curtain and asked if she needed help. She said no but as I was walking away she said something and I asked if she was talking to me since she had an aide with her. She muttered something inside the curtain and I opened the curtain to see what she wanted me to do. With much anger, she took my head in her hands, squeezed, and shook it with force and told me that a nurse should see another patient in the same room but didn't tell me what bed. I looked around and asked if anyone needed help—all smiled at me and said no, however, I found Doris and Kathy Ross in nurses discussion room and told and showed them of the insulting incident and perhaps a patient needing something. They went in—I don't know what 227D needed but it was not evident to me since he waved and his wife smiled!! I packed my things and waited for Roseanne to appear at my desk. She finally 4:30 p rushed past my desk but not fast enough not to hear me say: "Roseanne if you ever do that again, I'll break your neck!" She rushed to my desk, shook me by the shoulders (I told her to get her hands off me!!) She

said, "How dare you" and I left!!!!" (Spelling, punctuation and phrasing are as set out in Bishop's memo.)

I accept this memo as Bishop's version of the events of September 21. There are only three witnesses to the bedside incident, Dickinson, Bishop, and Corning. There are only two witnesses to the latter incident at the nurses' station, Bishop and Corning. All credible determinations of the events of September 21, will be made from these witnesses' testimony or in Bishop's case, her memo. All other testimony about these events is absolute hearsay from people with a stake in the outcome of the proceeding. There is no showing why Respondent did not take a further statement from Bishop if it thought the one she prepared was incorrect or omitted pertinent facts. It should have been clear to Respondent shortly after Corning's discharge that it was going to be sued over the discharge in one forum or another.

The clearest embellishment of Bishop's memo comes from testimony of some of Respondent's witnesses who now claim that Bishop complained that Corning touched her with dirty gloves. I do not credit such testimony. If that were an issue, I feel certain that Bishop would have noted it in her memo. It is written in detail and she was clearly angry enough to have said anything that she thought would make her case against Corning stronger. Supervisor Spinelli saw Bishop on September 22, and interviewed her about the incident. She wrote what she was told and this document, made before Conley was involved in the matter, says nothing about gloves. Once Conley got involved in the matter, the dirty gloves allegation surfaces. Conley testified that she learned of the event from Spinelli on Sunday, September 22.<sup>21</sup> Spinelli told Conley what she knew and put Bishop's memo in Conley's office. Conley testified that she called Bishop's supervisor, Pat Corradino and was told basically what appears in Bishop's memo, with the dirty glove part added.<sup>22</sup> She testified that she called Bishop and Bishop, *inter alia*, expressed concern that she had been touched by dirty gloves and was afraid that she had had contact with some kind of bacteria or germs. Again, I believe this to be a fabricated embellishment of Bishop's own words. Though it had ample opportunity to do so, Respondent, through Corradino or Conley could have had Bishop give a statement or affidavit or deposition where this claim is made. That they did not do so I believe and find is simply that this assertion is not true and Bishop would not have given such a statement. Conley claims that Dickinson told her that Corning put gloved hands to Bishop's face, a fact that Dickinson under oath said she did not tell Conley as she did not remember and did not believe Corning would do. Another curious aspect of this case is the fact that Bishop claims that Cor-

ning shook her in the hallway at the nurses' station. Corning denies this took place and Respondent did not rely on this assertion in its decision to discharge Corning. Respondent only relied on the hands to the face touching as a reason for the discharge. Evidently, Respondent did not believe this part of Bishop's story.

Corning worked the next day, Sunday, September 22, and no one from management spoke with her about the incident of the day before. On the following day, September 23, Supervisor Jones called Corning on the phone. Jones told Corning that Bishop had written a letter complaining of Corning, that the co-directors of nursing were taking it very seriously, and that Corning was to report to them the next day before her shift. Jones also asked if Corning had documented the incident and Corning stated she was doing it. Franco testified that she spoke with Corning on the 23rd by telephone and told her to come in and talk about the incident.

On Tuesday, September 24, Corning met with Rosemary Franco, Judith Conley, and Ron Knight in Knight's office. This was the first time anyone bothered getting Corning's side of the story. Corning gave Knight her documentation of the incident with Bishop. The documentation tracks her direct testimony set out above. After the three members of management had read the documentation, Knight thanked her for coming. Corning stated that she would go to work and Knight said, "No, I don't think I want you on the floor until we decide how to handle this." Corning replied by stating her feelings about Bishop's incompetence and her threats to break Corning's neck. She indicated that having Bishop in the position she functioned in was not safe. She asked Knight that if the Hospice could not give them the proper amount of nursing staff, then at least the Hospice needed competent volunteer staff that can function in a safe manner. Corning then asked what the complaint about her was and whether she could see Bishop's letter. No one responded to these requests. There was a pause and then Conley said it was about touching. Corning noted that nurses touch in the Hospice all the time and no one says anything about it. Franco then said it was not that kind of touching. Corning then said she had touched Bishop and demonstrated what she had done. She pointed out that Dickinson had observed the entire incident at bedside. No one commented on this. Corning then said that the Hospice had a responsibility to provide adequate staffing so that incidents like this do not happen. Knight then asked if Corning ever touched Bishop again after the first touching and Corning said she had not. Knight asked if she touched Bishop at the nursing station and Corning said she had not. As she was not being allowed to work that day, Corning inquired whether she could work on her next scheduled day, Thursday, September 26. Knight said they would get back to her with an answer.

Franco testified that after Corning left the meeting of the 24th, she decided Corning should be terminated based on the touching with dirty gloves. She testified that Bishop's statement made the allegation of dirty gloves, which in fact it does not. She did not read Bishop's statement until about a month prior to the hearing in this proceeding. She later amended her testimony to say that Corning was terminated because of aggressive behavior towards a volunteer, not touching with dirty gloves.

<sup>21</sup> Conley was "on call administrator" on September 21, but was not called about this event on the evening it occurred though subsequently the event was considered serious enough to cause Corning's termination.

<sup>22</sup> Corradino claims to have had for a period of time a tape recording on her answering machine of a conversation with Bishop on the night of September 21. She also claims that the recording was destroyed. There was no reason given for not transcribing the tape and having Bishop sign it. She testified that when she saw Conley the next day, both she and Conley had a copy of Bishop's own memo, which Corradino stated was the exact words Bishop had used in her taped conversation. As noted earlier, this memo says nothing about gloves.

She further testified that she did not think anyone should touch anybody's face without permission. Then she admitted that at the hearing she had walked by Corning and patted her on the head without permission.

Conley testified that following the September 24 meeting, she inquired about Bishop's competence with Corradino and a nurse, Nancy McGinley, who is a team leader. According to Conley, Bishop was initially told to stay home after this incident because she was involved in the incident and because she threatened to break Corning's neck. Conley testified that she was allowed to volunteer once or twice thereafter. Corradino testified that to the best of her knowledge, Bishop never returned to the Hospice as a volunteer. She became ill shortly after the incident of September 21. Bishop was admitted to the Hospice as a patient in November and died shortly thereafter.

On Thursday, September 26, Corning spoke with Franco by phone and was told to come to the Hospice on Friday, but not for work. She went to the Hospice on Friday and reported to Franco. Franco escorted her to Caroline Musmanno's office. On the way, Corning told Franco that she did not understand what was going on and that no one was addressing the issue of Bishop's threat to her or Bishop's continuing to work on the wing. Franco said, "I know."<sup>23</sup> Franco left Corning at Musmanno's office and did not attend the meeting held thereafter. In the office were Musmanno, Knight, and Conley. Musmanno began the meeting by saying the Hospice had a policy of non-violence and as Corning had committed an act of violence, the Hospice could no longer offer her employment. Corning said she was not a violent person and had not committed any act of violence. Corning asked if Musmanno had seen her documentation and Musmanno said she had not. She added there had been a thorough investigation which she had learned of that morning, but had not taken part in. Corning then gave Musmanno her documentation and Musmanno put it on the desk.<sup>24</sup> Corning then demonstrated for Musmanno how she had touched Bishop. Musmanno then asked Corning to sign a waiver of liability and suggested she contact an attorney before she signed it. She was then given her final paycheck. Musmanno then said that based on Corning's excellent evaluations, the Hospice would not contest her claim for unemployment compensation, would extend her health insurance to November and would give her 6 weeks severance pay, if Corning would sign the waiver of liability.<sup>25</sup>

Musmanno then escorted Corning out of the building. On the way out, Musmanno said that Corning was special and was special to her, and that she would not have been able to judge the incident impartially. Corning then reminded Musmanno about a prior incident where Musmanno had placed surveys seeking employee suggestions to make the Hospice a better workplace in employee's office mailboxes. The surveys had been removed from the mailboxes and Musmanno was sus-

pended for 2 days for initiating the survey. Musmanno said she remembered the incident, and Corning asked if Musmanno had gotten the list of suggestions that Corning had slipped under her door and Musmanno said she had read them. Musmanno then urged Corning to seek legal counsel.

On October 3, Corning filed a formal grievance over her termination with the Hospice. On or about October 10, counsel for Respondent wrote Corning's counsel a letter stating, "It is the practice of The Connecticut Hospice, Inc. that once outside counsel is engaged over a personnel matter all communication is between me and the outside counsel. Therefore the grievance procedure reference in Mrs. Corning's letter dated October 3, 2002 is not applicable."

No Hospice policy is cited as supporting the proposition that because Corning sought legal advice her use of the grievance procedure was barred.

Corning was never given a letter of termination by Respondent. One of the printed Policies and Procedures of the Respondent's Human Resources Department states: "*Termination* — In all cases where an employment is terminated by resignation, a letter in writing is requested. *If an employee is dismissed involuntarily, the reasons must be documented in a letter addressed to the employee, and a copy of this letter will accompany the Personnel Action Form—Appendix*). *When it is learned that an employee will be terminated, the Personnel Action Form will be submitted to the Human Resources office as soon as the effective date is known.*" (Emphasis added.) Human Resources Director Musmanno testified this policy was in effect when Corning was terminated. No personnel action form was prepared for Corning's discharge and as noted above, no letter was given to her documenting the reasons for her discharge.

Musmanno testified that Respondent has a progressive discipline procedure. She testified that it is primarily a verbal warning, then up to three written warnings, and then perhaps a suspension. Another of Respondent's written human resources policies states: "*Types of Misconduct*—Certain types of misconduct are considered very serious offenses and may lead to immediate disciplinary action, including termination of employment. These include but are not limited to such offenses as falsifying employment or other work records; patient/family abuse; being under the influence of drugs or intoxicating beverages on Hospice premises; fighting; insubordination; immoral or illegal conduct connected with employment; use of abusive language; and violating patient confidentiality. Discharge for such causes may be made without notice and result in forfeiture of final PTO pay. Such discharges must be approved by the Director of Human Resources, and employees terminated under such procedure may file a grievance." This policy was in effect at the time of Corning's discharge. Corning's actions in touching Bishop certainly does not rise to the level of offense described in this policy.

Conley testified that another employee Bonnie Fisher was terminated without progressive discipline for making medication errors and not following doctors' orders. Another nurse named Carlene Thurston was terminated for similar reasons. Another employee, CNA Rose Vitello, was terminated for slapping a patient. There was a personnel action form prepared

<sup>23</sup> Franco denied this conversation took place on September 24. She did not deny that it occurred on September 27, as stated by Corning.

<sup>24</sup> None of the management team making the decision to terminate ever took Corning's documentation to Dickinson to confirm whether it was accurate or not.

<sup>25</sup> Corning filed for unemployment compensation and Respondent did not contest the application.

for Vitello's termination. Prior to Corning, no employee had been discharged for a touching incident.

Conley also testified that there was a Hospice policy or rule that allowed termination without going through progressive discipline when conduct was so egregious that it warranted termination and testified that "touching someone, putting your hands on somebody" was covered by this rule or policy. The rule in question is set forth above and says nothing about touching.

Musmanno testified that it is her normal procedure to review the substance of investigations of alleged misconduct before approving termination. However, in another departure from normal procedure, Musmanno did not review the results of the investigation of the Corning—Bishop incident. She believed the investigation was done by Judith Conley who she understood to have interviewed Corning, Wrezyenski, Anne Bishop, and Dickinson.

*Musmanno testified in response to a question from me that Corning was terminated solely for "unwarranted and aggressive touching of a volunteer at Hospice."*<sup>26</sup> Later she expanded on that answer in response to a question from her counsel: "My understanding is that in an act of anger, Ms. Corning took Ms. Bishop's face in her hands, when her hands were gloved, when she was with a patient; turned her head toward her and said, 'Read my lips. This is what I want you to do.' And that this was an act of unwanted touching and aggression was very, very, traumatic, and rightfully so; because it was a forceful act, forcing her head to turn around and look at her face in order for her lips to be read, so that Ms. Corning could impart whatever information she wanted to impart to Anne Bishop."

Musmanno testified that the decision to terminate was made jointly by herself, Franco, Knight, Goldfarb, and Conley. She testified that other than the meeting with Corning on September 25, Franco had no part in the investigation. She received written documentation of the investigation from Conley after the termination had been made effective and Corning escorted out the door.

With respect to the termination meeting on September 27, Musmanno testified that she did not tell Corning she was discharged for violating the Hospice's nonviolence policy as the Hospice does not have such a policy. She testified that she told Corning that Corning had committed an "aggressive" act. She told Corning that the Hospice will not tolerate any unwarranted touching or aggressive behavior. What Musmanno remembers being told about the incident with Bishop and Corning was that Corning "put her hands on her face, Roseanne did; and she had gloves on; and that it was a — an act to make her move her face to look at Roseanne." Musmanno testified that she learned about a week after the termination that Dickinson had backed off her earlier statement in the investigation. Of course, even if this occurred it happened after Corning had already been termi-

nated. No other witness made such an allegation about Dickinson and I believe this testimony to be another fabrication.

#### *E. Finding and Conclusions*

By all accounts, Corning was an excellent nurse as demonstrated by her performance evaluations and the absence of any proof of poor performance. Her last performance evaluation, given in April, rates her at the next to highest level in the evaluation system. Yet, between April and September, something happened to sour Respondent's view of her that caused it to discharge her over an incident that to any rational person would warrant only a counseling or written warning at worst. The record demonstrates that Respondent seized upon the Bishop incident as an excuse to discharge an excellent and experienced nurse at a time when there is an extreme shortage of nurses. Indeed, in the summer before Corning's discharge, the Respondent established a committee to explore ways to retain nurses because of staffing shortages among nurses. I find and the record only supports the fact that Respondent discharged Corning because she engaged in protected, concerted activities which it felt were a threat to its ability to manage in an unfettered manner.

To establish a prima facie case of unlawful discharge under the Act, the General Counsel must prove by a preponderance of the evidence that the employee engaged in protected concerted activities, that Respondent knew of these activities, that Respondent was hostile toward these activities, and that Respondent discharged the employee because of these activities. *Sears Roebuck & Co.*, 337 NLRB 443 (2002); *Wright Line*, 251 NLRB 1083 (1980); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Once the General Counsel shows such unlawful motivation, the burden of persuasion then shifts to Respondent to prove that it would have discharged the employee for legitimate, nondiscriminatory reasons, even in the absence of the employee's protected concerted activities. *Manno Electric*, supra. The Respondent, however, cannot simply present a legitimate reason for its action, but rather must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989).

The General Counsel may then rebut the Respondent's defense. If the General Counsel does so successfully, the prima facie case stands, and the violation is established. *Wright Line*, supra. Some indicia of pretext, that is, factors which the Board has relied upon in finding that the General Counsel has successfully rebutted the Respondent's *Wright Line* defenses, include (1) disparity in the Respondent's treatment of the discriminatee as opposed to its treatment of other employees; (2) the Respondent's assertion of "bad attitude," by which is meant protected activities; (3) the Respondent's failure to follow its own policies; (4) the satisfactory work record of the discriminatee; (5) the Respondent's failure to investigate the alleged problem or its conduct of a sham investigation; (6) timing of the discharge; and (7) changes in position in explaining the reason for the discharge. All of these indicia of unlawful motivation are established by the evidence in this record.

The first question that must be answered is did Corning engage in protected concerted activities. The Board has held that

<sup>26</sup> Though there are some written notes of meetings with management and Corning which have been discussed in this decision, no one testifying contended that these were disciplines or that they played any part in the decision to terminate. In fact Musmanno and Conley went out of their way to deny that these events were a factor in Corning's discharge.

an employee's activity is concerted if the employee engages in activity with or on the authority of other employees and not solely by and on behalf of the employee herself. *Meyer Industries*, 268 NLRB 493 (1984). When concerted activities involve employee complaints regarding wages, hours, and terms and conditions of employment, they are also protected by Section 7 of the Act. *Krist Oil Co.*, 328 NLRB 825, 841 (1999), citing *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F. 2d 441, 445 (6th Cir. 1981). The evidence establishes that Corning was engaged in protected concerted activities during the months immediately preceding her discharge, and that Respondent's knowledge of and animus toward those activities evinces its illegal motivation for terminating Corning. *Meyers Industries*, supra; *Krist Oil Co.*, supra.

Corning's protected activity began in August 2001 with her drafting the pension letter/petition, at the urging of co-worker Gerlach, as well as the subsequent solicitation of employee signatures for that petition.<sup>27</sup> Respondent's knowledge of and animus toward Corning for circulating the petition, which resulted in a federal investigation, is revealed by Musmanno's response "that could do it" in commenting on Corning's concerns that her circulation of the petition was the cause of her alleged harassment at the hands of another superior.

However, it is my view that Corning's actions in the summer of 2002 were the cause of her termination. Corning's actions to improve working conditions for nurses at Respondent's facility, by raising issues of nurse retention and by introducing the concept of refusing unsafe working assignments, continued from June through August, and were a continuing source of frustration to Respondent's management. Corning first raised the concept of a nurse retention committee at Respondent's facility at staff meetings attended by Respondent's management. She then solicited suggestions from coworkers, prepared a list of those suggestions, and had the list presented to management by coworkers placed on the committee. Respondent's management knew well that Corning was the driving force behind the committee and that she had compiled the list of suggestions with which they then had to address. Respondent's falsification of the results of the election for membership on the nurse retention committee to exclude Corning reveals its animus toward Corning and her protected activities. It is telling that having responded to the pressure Corning brought to establish this committee and to give it an agenda from which to work, Respondent implemented no changes whatsoever and disbanded the committee after a few meetings.

Corning's refusal of an unsafe nursing assignment and her threat to refuse any assignment that had an unsafe patient to nurse ratio clearly engendered Respondent's ill will. Corning spoke out at meetings, shared literature with management and colleagues, and declined an unsafe nursing assignment, all protected concerted activities. I have found that Jones threatened Corning with unspecified reprisals by telling Corning to "be careful" about showing the *Quick Reference* booklet to her coworkers and asserting rights derived from the booklet. In

determining whether such a remark violates Section 8(a)(1), the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995); *Reeves Bros., Inc.*, 320 NLRB 1082 (1996); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). Respondent violated Section 8(a)(1) by the threat of its admitted Supervisor Jones.

In addition to Jones' threat, Franco and Conley gave strong signals of hostility to this activity. Franco's comment at the August 7 meeting with Corning, Jones, and Batson, that "this can't go on, because it is going to escalate, other people are going to be doing this, and I'm going to have to take it further," clearly demonstrates animus towards Corning's activities. The very next day after Franco admonished Corning for refusing an assignment, Conley spoke out at a staff meeting and strongly articulated management's disapproval of nurses taking the action that Corning took. That Corning was not disciplined for refusing the assignment indicates to me that it was an allowable action under regulations governing nursing.

Corning continued to advocate for employee wage issues in August, by providing letters to Respondent's CEO Hurtzler regarding a bonus, in which she evocatively referred to the staff's discontent over working conditions. Corning also gave the paycheck pamphlet to Musmanno and Goldfarb in her challenge to changes made in her timesheet.

I find that by September, Corning's protected concerted activities had caused Respondent's management to harbor animus toward her and her activities. I believe this animus was the real and unlawful motivation for her discharge and Respondent's professed reasons are nothing but a pretext. This finding is bolstered by the circumstances surrounding Corning's termination. The Board has held that a finding of unlawful motivation is supported by a number of factors including (1) timing of the disputed conduct, *Forestwood Farms, Inc.*, 308 NLRB 1049, 1054 (1992); (2) failure to tell an employee at the time of discipline the reason for the adverse conduct, *Triple H Electric Co.*, 323 NLRB 549, 553 (1997); (3) issuing a severe penalty for a trivial offense, *Parkway Manor-Cillage Inn, Inc.*, 299 NLRB 574, 576 (1990); and (4) shortage of labor at the time of the adverse conduct, *Leather Center, Inc.*, 308 NLRB at 30. All of these factors are present in the instant case.

The timing of Corning's discharge—early one month after she had culminated a summer of advocacy over workplace issues—strongly supports an inference of unlawful motive. *In Re USF Dugan, Inc.*, 332 NLRB 409 (2000) (discharge within months of discriminatee's visible protected activities); *Overnight Transportation*, 297 NLRB 638 (1990) (1 month between protected activity and discharge). Respondent's failure to put the reasons for Corning's discharge in writing, in violation of its own personnel policy, also evinces its unlawful motivation. *North Star Refrigerator Co.*, 207 NLRB 500, 505 (1973).

Respondent, by issuing the ultimate discipline—discharge—for conduct which, by the description of Corning and Dickinson—the only uninvolved eyewitness to the incident—was harmless though upsetting, further establishes its unlawful motivation. Respondent willfully ignored their detailed description of

<sup>27</sup> Events prior to the 6 months statute of limitations may be used as background to shed light on a respondent's motivation for conduct within the 10(b) period. *Grimmway Farms*, 314 NLRB 73, 74 (1994).

Corning's contact with Bishop as gentle and innocuous, and instead credited the account of Bishop. Respondent must have seen that what Corning did was not sufficient to justify her termination, so it went beyond what Dickinson, Corning, or Bishop had to say about the incident and created the issue of dirty gloves. As noted earlier, that claim is not made by any of these three people. As noted earlier in this decision, I have only credited Bishop's handwritten memo for her version of the events and not the blatant hearsay evidence of those of Respondent's witnesses who purportedly spoke with her after the incident took place. The accuracy of these witnesses account of what Bishop said is not only called into question by the omission of any mention of gloves in Bishop's memo, it is also called in question by Conley's embellishment of what Dickinson told her. Conley's notes of her telephone conversation with Dickinson state that Corning was wearing gloves. Dickinson testified that she did remember whether Corning was wearing gloves or not and she told Conley that she did not remember during the phone call. I credit Dickinson's and Corning's version of the incident. Respondent's attempts to embellish the incident as noted above and its refusal to accept the account of the event by the only nonparty eyewitness, and then giving its harshest discipline reveals its unlawful motivation in discharging Corning. *Dayton Tire & Rubber Co.*, 216 NLRB 1003, 1010 (1975).

Respondent's discharge of Corning for this offense while suffering an admitted nursing shortage also supports a finding of unlawful motivation. Conley affirmed that Respondent, like other nursing facilities across the country, was suffering from a nursing shortage, therefore rendering even more suspect its precipitous decision to terminate Corning based on her innocuous conduct. Respondent's notes of its staff meetings and the testimony adduced about them clearly show that Respondent was actively recruiting nurses and attempting to retain the ones it already employed. In this setting, to discharge an experienced nurse like Corning for what she did to Bishop simply defies logic. Corning's repositioning of Bishop's head to enable Bishop to understand what she was saying was understandable under the circumstance. As Dickinson testified, repositioning the head of a person with a hearing disorder is a common technique to focus their attention on the speaker's lips. Bishop clearly had a hearing disorder and taking the action that Corning took without any hint of violence or maliciousness would appear to me to justify at most a counseling and an apology to Bishop. Respondent also played a role in causing the incident by putting a hearing impaired person in the position it gave Bishop.

I believe and find that General Counsel has made a prima facie case of unlawful motivation in Respondent's discharge of Corning. I also for the reasons set out above and those to follow that Respondent has failed to carry its *Wright Line* burden of persuading that it would have taken the same action even in the absence of protected concerted activity. In addition to the reasons given above, I find that Respondent conducted a sham investigation, ignored Corning's exemplary work record, and gave shifting reasons for her discharge.

Respondent asserts that it decided to terminate Corning only after conducting a full investigation into the incident. The re-

cord evidence fails to support this claim. As noted above, Respondent did not take a statement from Bishop, Corning, or Dickinson. I have already found that Respondent fabricated the claim of dirty gloves. As noted earlier, neither Bishop's handwritten memo nor Spinelli's notes of what Bishop told her on the 22nd mention gloves at all.

Respondent also failed to appropriately question Dickinson, the only impartial eyewitness to the event. Conley's notes of the conversation—a brief three sentences—underscores the inadequate nature of the investigation. Conley testified that she asked Dickinson generally whether she was aware of any incident between staff on September 21, then allowed Dickinson to explain. Even then Conley got it wrong. Dickinson credibly testified that she told Conley that she did not remember if Corning was wearing gloves when she touched Bishop, yet Conley wrote in her notes that Corning touched Bishop with gloves. On a subsequent meeting with Dickinson, Dickinson demonstrated to Conley how Corning touched Bishop, but Conley did not document this meeting. Respondent's management did not have Dickinson document what happened during the incident.

Respondent's halfhearted efforts to question Corning regarding her account of the incident, or otherwise corroborate her account, further exposes the pretextual nature of its investigation. First, after receiving Bishop's claims, Respondent waited 2 days before speaking to Corning, contrary to Conley's false claim that Franco spoke by telephone with her to discuss the allegations. In addition, at the September 24 meeting with Knight, Franco and Conley, after receiving Corning's documentation of the incident, Knight merely thanked Corning for coming, without pursuing further discussion or explanation of what had occurred. None of the administrators specifically questioned Corning about the incident until she inquired further as to the grounds of Bishop's complaint. Respondent never corroborated Corning's account with Dickinson, nor investigated the matter further based on Corning's documentation.

Respondent's choice of the administrator to direct the investigation also reveals the spurious nature of its investigation. The record evidence shows that although Musmanno had typically directed investigations into employee discipline, she was only nominally involved with the decision to terminate Corning. Respondent's exclusion of Musmanno from the Corning investigation, therefore, clouds its legitimacy and raises the suspicion of pretext. In addition, Conley and Franco both admitted that prior to the discharge of Corning, they had never investigated a terminable offense during their tenure as co-directors of nursing at Respondent's facility.

As noted at the outset of this section, Respondent ignored Corning's exemplary work record, as documented by her performance evaluations. Musmanno, moreover, noted Corning's exemplary work record as grounds for offering her a severance package and extended health benefits in the September 27 termination meeting. Musmanno's private admonition to Corning to seek legal advice belies Respondent's public contention that Corning was discharged for a legitimate, nondiscriminatory reason.

Respondent's handling of Bishop's threat to break Corning's neck also evinces its disparate treatment of Corning. Spinelli initially recorded Bishop's threat in her notes of her conversa-

tions with Corning and Bishop regarding the September 21 event. Bishop herself confirmed that she had made the threat in her written account of the episode. Despite this documentation, Respondent failed to investigate the matter further. Conley never questioned Bishop regarding the threat. Rather, Respondent, despite its claim that it has a policy of against aggressive behavior, appears to have merely informally suspended Bishop, while discharging Corning.

Respondent's shifting defenses to its discharge of Corning further proves that Respondent's claims are pretextual and designed to hide its unlawful intent. Musmanno, during her September 27 meeting with Corning, Conley and Knight, informed Corning that Respondent was discharging her because she had committed a "violent act." During the course of the trial, however, Respondent's justification for her termination deviated from administrator to administrator. On the second day of trial, Musmanno stated that Respondent had terminated Corning for "unwarranted and aggressive touching of a volunteer at the Hospice." She later embellished her description of Corning's alleged offense by testifying that Corning had been terminated for her "unwarranted and assaultive" act. She then testified: "My understanding is that in an act of anger, Ms. Corning took Ms. Bishop's face in her hands, when her hands were gloved, when she was with a patient; turned her head toward her and said, 'Read my lips. This is what I want you to do.' And that this was act of unwanted touching and aggression was very, very, traumatic, and rightfully so; because it was a forceful act, forcing her head to turn around and look at her face in order for her lips to be read, so that Ms. Corning could impart whatever information she wanted to impart to Anne Bishop." It is difficult to understand how Musmanno came to this understanding as other than her testimony the record is devoid of any reference to "read my lips. This is what I want you to do."

Conley also articulated a varying rationale for Corning's discharge. On direct examination, she stated that Respondent had terminated Corning because she had put her hands on Bishop. She further stated that Corning had been discharged because the touching was "unwelcomed." However, Respondent's personnel policies are devoid of any reference to merely touching a person at the Hospice as being a terminable offense. Conley admitted that Respondent had not put employees on notice, either verbally or in writing, that they were not to touch persons without consent.

Franco offered yet another rationale for Corning's discharge, testifying on direct examination that Respondent had terminated Corning for touching Bishop with dirty gloves. Franco was the only administrator to focus on dirty gloves as the cause of Corning's termination. Franco further reiterated her belief that Corning was discharged for allegedly wearing dirty gloves, and relied on Bishop's own memo as the basis for her understanding that dirty gloves had been worn. As I have noted earlier, neither Bishop's own statement, dated on the day of the incident, nor Bishop's verbal report to Spinelli the following day, contains any reference to gloves, much less dirty gloves. Franco later changed her story again, testifying on cross-examination that Respondent had not terminated Corning for wearing dirty gloves, but rather for the singular act of touching

someone, adding, "I don't think I would touch anybody's face unless I asked permission."

Finally in its position statement to the Region dated January 27, 2003, Respondent, in total contrast to the rationales provided by its administrators, asserted that it had discharged Corning due to her alleged abuse of Bishop, and her overall work record, including complaints from Respondents patients and families. Respondent's witnesses, however, admitted that the alleged complaints were not disciplinary in nature. Respondent's shifting defenses are clearly pretextual and reveal its unlawful motivation for discharging Corning. I find that Respondent discharged Corning because she engaged in protected concerted activity in violation of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by threatening its employee Roseanne Corning with unspecified reprisals because the employee engaged in protected concerted activities.

3. Respondent violated Section 8(a)(1) of the Act by discharging its employee Roseanne Corning because she engaged in protected concerted activities.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employee Roseanne Corning, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that the Respondent be required to remove from its files any reference to the unlawful discharge of Roseanne Corning and notify her that this has been done and that it will not use this adverse action against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>28</sup>

#### ORDER

The Respondent, Connecticut Hospice, Inc., Branford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>28</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Threatening its employees with unspecified reprisals because they engaged in protected concerted activities.

(b) Discharging its employees because they engaged in protected concerted activities.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to Roseanne Corning reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days of this Order, make Roseanne Corning whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(c) Within 14 days of this Order, remove from the file of Roseanne Corning any reference to her unlawful discharge and within 3 days thereafter, notify her in writing that this has been done and that her unlawful discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Branford, Connecticut, copies of the attached notice marked "Appendix."<sup>29</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the

Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 27, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. December 3, 2003

## APPENDIX

### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT threaten you with unspecified reprisals if you act together with other employees for your benefit and protection.

WE WILL NOT fire you because you act together with other employees for your benefit and protection.

WE WILL return Roseanne Corning to her former job along with all of her seniority and all other rights and privileges and WE WILL remove from her file any reference to her unlawful discharge and notify of this fact in writing.

WE WILL pay her for any wages and benefits she lost as a result of her unlawful discharge.

CONNECTICUT HOSPICE, INC.

<sup>29</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."